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Supreme Court U.S.

04-986 JAN 21 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MITCH MORROW, Superintendent, Oregon State Correctional Institution,

Petitioner,

v.

EARL X,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a habeas petitioner challenging a state judgment amends his petition to include a new claim, does the amendment relate back to the date of the filing of his petition and thus avoid the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), so long as the new claim stems from the prisoner's trial, conviction, or sentence?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mitch Morrow respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's order (App-1 to App-10) is unreported. The order and memorandum opinion of the Ninth Circuit (App-11 to App-13) is unreported. The order of the Ninth Circuit denying the state's Petition for Panel Rehearing and Suggestion for Rehearing En Banc (App-14) is unreported.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was filed on August 30, 2004. The order denying the state's petition for rehearing was filed on October 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULE OF CIVIL PROCEDURE

Section 2244 of Title 28 of the United States Code provides in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court * * *.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending

> shall not be counted toward any period of limitation under this subsection.

Federal Rule of Civil Procedure 15(c) provides in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when
>
> * * *
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]

STATEMENT OF THE CASE

Petitioner timely filed a 28 U.S.C. § 2254 habeas petition in 1999, alleging that defense counsel at his criminal trial provided ineffective assistance of counsel. After the limitation period for filing a timely petition expired, petitioner moved to amend the petition by adding a new claim, a claim alleging that the state—prior to trial—failed to disclose exculpatory evidence and thereby violated *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied the motion, ruling that the *Brady* claim did not "relate back" to the earlier claim for purposes of Federal Rule of Civil Procedure 15(c)(2). The district court concluded that the *Brady* claim thus was untimely. App-7

The Ninth Circuit Court of Appeals reversed and remanded in an unpublished order and memorandum opin-

ion. The panel relied on *Felix v. Mayle*, 379 F.3d 612 (2004). It explained that *Felix* had held that under Rule 15(c)(2) "the proper 'conduct, transaction, or occurrence' in a habeas context is the trial and conviction under attack." App-12. Without any further discussion of *Felix*, the court concluded that "[p]etitioner's new *Brady* claim therefore relates back to his initial petition under Rule 15(c)(2) because it arose out of the same trial and conviction as the claims set forth in his original pleading." *Id.*

The state sought panel rehearing or rehearing en banc, pointing out that the federal appellate courts have reached conflicting conclusions about the application of Federal Rule of Civil Procedure 15(c) in this context, both within and between the different circuits. The Ninth Circuit denied the state's petition. App-14

REASONS FOR GRANTING THE PETITION

On January 7, 2005, this Court granted the petition for writ of certiorari in *Mayle v. Felix*, No. 04-563. In that case, the Ninth Circuit Court of Appeals announced that "a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction." *Felix v. Mayle*, 379 F.3d at 614. The court disagreed "with the decisions of several circuits that deny relation back under Rule 15(c)(2) when a new claim rests on a theory or facts within a trial not raised in the original habeas petition." *Id.* at 615. The Ninth Circuit based its holding in this case on its analysis and conclusion in *Felix*.

The state's petition in this case seeks review of the same question presented in *Felix*. Therefore, this case

should be held pending the Court's decision in *Mayle v. Felix*, No. 04-563, and disposed of as appropriate in light of the Court's decision in that case.

CONCLUSION

The petition for writ of certiorari should be held pending this Court's decision in *Mayle v. Felix*, No. 04-563, and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted,

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January 24, 2005

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EARL L. NEW, CV 99-939-BR

Petitioner,

v.

MITCH MORROW, Superintendent, Oregon State Correctional Institution, OPINION AND ORDER

Respondent.

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BROWN, Judge.

Petitioner brings this action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Currently before the Court is Petitioner's Motion to Amend Petition for Writ of Habeas Corpus (#50). For the reasons that follow, the Motion is **DENIED**.

BACKGROUND

Petitioner was convicted in 1994 on state charges of Burglary in the First Degree, Menacing, Kidnapping in the First Degree, Kidnapping in the Second Degree, and Sodomy in the First Degree. On June 31, 1999, he filed a *pro se* Petition for Writ of Habeas Corpus with this Court in which he set forth two grounds for relief.[1] Petitioner alleged ineffective assistance of trial counsel and contended trial counsel:

1. Failed to investigate and to present evidence;
2. Failed to request an evaluation of Petitioner's mental state at the time of the crimes and/or his capacity to aid and to assist in the defense;
3. Failed to object to trial court rulings and to the trial court's failure to satisfy state law requirements in pronouncing sentence; and
4. Failed to properly advise Petitioner of the possible maximum sentence, which

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[1] In the interim, Petitioner pursued available state remedies. Those proceedings, however, are not relevant to the issue at hand.

> led Petitioner to reject a five-year plea offer.

The Petition also contained the following language:

> Petitioner, untrained in law, unable to understand "legalese" and the complexities of the law, has and continues to require assistance from other inmates in all of his past and current filings with the courts and received assistance from other inmates in the preparation and filing of this petition. *Petitioner, after appointment of, and consultation with suitable counsel, reserves the right to add issues of law and/or fact to the Amended Petition.*

(Emphasis added.)

This Court appointed counsel to represent Petitioner, and on August 20, 2001, counsel filed a motion for leave to amend the Petition. In the proposed Amended Petition, Petitioner alleged the prosecutor violated Petitioner's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner contends the prosecutor failed to disclose to Petitioner's trial attorney evidence that Petitioner had worked as a confidential informant for the City of Stayton Police Department (which was not the agency involved in investigating the crimes that underlie this proceeding) and that Petitioner had provided information to the Stayton Police Department about criminal activity of the victim of Petitioner's crimes. If the law enforcement officers with whom Petitioner worked had been called to testify at trial, Petitioner contends they would have offered relevant and admissible testimony

about Petitioner, including his credibility and reputation for peacefulness in the community, and about the victim's motive in accusing Petitioner falsely of crimes he did not commit.

Respondent objects to Petitioner's Motion to Amend and contends amendment of the Petition would be futile because the proposed new claim is time-barred and procedurally defaulted. Petitioner counters the new claim relates back to the original filing date or, in the alternative, the amendment is timely under the savings clause of 28 U.S.C. § 2244 (d) (1) (D) and the statute of limitation was equitable tolled by the State's breach of its duty to disclose. Petitioner does not address directly the procedural default issue. Petitioner instead argues the Court should not determine whether the claim is procedurally defaulted until the Petition has been amended and fully briefed. Finally, Petitioner contends the statute of limitations would impermissibly suspend a writ of habeas corpus if applied to bar the proposed new claim.

DISCUSSION

I. Futility of Amendment

A. Timeliness and Relation Back

Pursuant to 28 U.S.C. § 2244 (d)(1), an applicant for a writ of habeas corpus under 28 U.S.C. § 2254 must file a petition within one year from the date the state court judgment became final.[2] Here the parties agree the limitations period of one year expired on August 17, 1999,

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[2] The statute also provides for tolling of the limitations period under certain circumstances not at issue in this matter.

after Petitioner's original *pro se* Petition was filed, but before the date Petitioner filed the Motion to Amend. Respondent, therefore, contends the proposed amended claim is time-barred under § 2244 (d) (1). Petitioner counters the proposed amendment is not time-barred and contends it "relates back" to the original filing date.

Pursuant to 28 U.S.C. § 2242, habeas corpus applications "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." Pursuant to Fed. R. Civ. P. 15(a), a petitioner may amend without obtaining leave of the court before an opponent has filed a response. After an answer has been filed, however, a habeas corpus petition may be amended "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

Claims in an untimely amended petition are not time-barred if they "relate back" to an earlier, timely petition. *Anthony v. Cambra*, 236 F.3d 568, 576-78 (9th Cir. 2000), *cert. denied,* 121 S. Ct. 2567 (2001). *See also* Fed. R. Civ. P. 15(c). Relation back is allowed when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c) (2). As the court noted in *Anthony,* the "touchstone" of the relation-back under Rule 15(c) is notice. The central policy behind the rule is to ensure "the non-moving party has sufficient notice of the facts and claims giving rise to the proposed amendment." *Id.* at 576.

The Ninth Circuit has not yet addressed the specific relation-back issue presented here; i.e., an effort by a habeas petitioner to amend his petition after the limitations period to add a new claim or theory. The majority of other courts considering the question, however, have held an amended habeas petition that introduces an entirely new claim after the expiration of the limitations period does not relate back to the original filing date. *See United States v. Craycraft*, 167 F.3d 451 (8th Cir. 1999). *See also United States v. Duffus*, 174 F.3d 333 (3d Cir.), *cert. denied*, 528 U.S. 866 (1999); *Davenport v. United States*, 217 F.3d 1341 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 1232 (2001); *United States v. Pittman*, 209 F.3d 314 (4th Cir. 2000); *Woodward v. Williams*, 263 F.3d 1135 (10th Cir. 2001); *Fama v. Commissioner of Correctional Services*, 235 F.3d 804 (2d Cir. 2000). *Cf. Woodward*, 263 F.3d at 1141 (amendment that "clarifies or amplifies" a claim or theory in the original petition relates back); *United States v. Thomas*, 221 F.3d 430 (3d Cir. 2000) (same).

The Ninth Circuit, however, permitted relation back of an amended petition to the original filing date in *Anthony*. In that case, the petitioner originally pleaded the challenged claims in his first petition and then dropped those claims because they were unexhausted. The original petition was stayed pending exhaustion proceedings in state court. 236 F.3d at 571. When those proceedings were completed, petitioner sought to amend his petition by reinstating the newly-exhausted claims. *Id.* The *Anthony* court carefully limited its holding to the facts at hand and specifically distinguished the case from others in which relation back was not allowed.

Here, in contrast, Petitioner's original Petition contained only allegations of ineffective assistance of counsel. Despite Petitioner's argument that the *Brady* claim should be allowed because he attempted to expressly reserve the right to amend his Petition after appointment of counsel, the *Brady* claim Petitioner seeks to add by amendment was not alleged or referenced in his original Petition. Respondent consequently had no notice that Petitioner meant to raise the *Brady* claim in federal court until Petitioner sought leave to file an amended petition. The *Brady* claim, therefore, does not relate back to the original Petition, and amendment of the Petition to include the claim would be futile. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend"), *cert. denied*, 516 U.S. 1051 (1996).

B. Procedural Default

As noted, in addition to arguing the untimeliness of the proposed amendment, Respondent contends the proposed *Brady* claim is procedurally defaulted. Because the Court finds the proposed amendment is untimely and, therefore, futile, it is unnecessary to determine whether the claim was properly exhausted in the state courts.

III. Equitable Tolling & Savings Clause

Petitioner, nevertheless, argues the proposed amended petition is timely either because it falls within the savings clause of § 2244 (d) (1) (D) or because the limitations period should be equitably tolled to permit its filing.

The savings clause upon which Petitioner relies provides the limitations period of one year shall run from

"the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244 (d) (1) (D). Petitioner argues the facts relevant to his proposed amended claim were not known to him until the investigation into this case this year. Petitioner contends, therefore, the limitations period has not yet expired. This argument, however, defies explanation. The facts alleged in the proposed amended petition establish Petitioner was acting as a confidential informant at the time of his crimes and provided information to police officers concerning the victim. Petitioner obviously knew both that he was acting as a confidential informant and that he had provided information concerning the victim. These are not "new" facts; they clearly could have been discovered in the limitations period through the exercise of due diligence.

Petitioner's argument that the limitations period should be equitably tolled fares no better. The Ninth Circuit allows equitable tolling of the § 2244(d) limitations period when "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). The "extraordinary circumstances" requirement is met "[w]hen external forces, rather than a Petitioner's lack of diligence, account for the failure to file a timely claim." *Id. See also Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283, 1288-89 (9t h Cir. 1997), *overruled on other grounds by Calderon v. U.S. District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (*en banc*) (petitioner entitled to equitable tolling when petitioner's counsel withdrew and left replacement counsel with un-

usable work product that made timely filing impossible); *Tillema v. Long*, 253 F.3d 494, 503 (9th Cir. 2001) (limitations period equitably tolled when district court committed prejudicial error by dismissing petitioner's first federal habeas petition without affording him the opportunity to abandon his sole, unexhausted claim).

Petitioner argues the State's alleged breach of its duty to disclose favorable evidence to his trial attorney is an external force that equitably tolls the limitations period. Even if the Court assumes without deciding that equitable tolling of § 2244 (d) could be premised upon a Brady violation, Petitioner fails to establish the information sought was not already in his knowledge and control as explained above. Accordingly, equitable tolling of the limitations period is not appropriate in these circumstances.

IV. Suspension of the Writ

Finally, the Court rejects Petitioner's argument that the limitations period is an unconstitutional suspension of the writ as applied to his circumstances.[3] Whether the limitations period of one year violates the Suspension

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[3] The Suspension Clause provides "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion of the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The Ninth Circuit has held § 2244 (d) is not a *per se* suspension of the writ in light of the fact that it is not jurisdictional and is subject to equitable tolling. *Green v. White*, 223 F.3d 1001, 1003-04 (9th Cir. 2000). The question remains, however, whether applying the limitations period to the specific circumstances of this case constitutes an impermissible suspension.

Clause depends upon whether it renders the remedy of habeas "inadequate or ineffective" to test the legality of detention. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). As noted, Petitioner did not pursue a claim based on facts uniquely in his possession that the prosecution failed to disclose to Petitioner's trial attorney that Petitioner was acting as a confidential informant. Because that information was in Petitioner's control at all relevant times, Petitioner's failure to pursue a timely claim based on this information does not render the remedy of federal habeas corpus "inadequate or ineffective."

CONCLUSION

Based on the foregoing, the Court **DENIES** Petitioner's Motion to Amend Petition for Writ of Habeas Corpus (#50).

IT IS FURTHER ORDERED that Petitioner shall have until March 25, 2002, to file any additional documents or briefs in support of the claims alleged in his orginal Petition for Writ of Habeas Corpus, and the Petition (#2) shall be taken **UNDER ADVISEMENT** on April 9, 2002.

IT IS SO ORDERED

DATED this 24th day of January, 2002.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL X,

Petitioner-Appellant,

v.

MITCH MORROW,

Respondent-Appellee.

No. 02-36051

D.C. No. CV-99-00939-BR

ORDER AND MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Submission Deferred March 3, 2004
Resubmitted as of the Date of this Order & Memorandum**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit Rule 36-3.

** We deferred submission of this case pending the Supreme Court's decision in *Pliler v. Ford*, 124 S. Ct. 2441 (2004). The Supreme Court's decision in that case vacated and reversed our decision in *Ford v. Hubbard*, 330 F.3d 1086 (9th Cir. 2003), leaving our decision with no precedential effect. However, because we find that another recently issued opinion, *Felix v. Mayle*, — F.3d —, 2004 WL 1770109 (9th Cir. Aug. 9, 2004), is dispositive of this appeal, we order the matter submitted on the briefs and without oral argument. *See* Fed. R. App. P. 34(a)2).

Portland, Oregon

BEFORE: HUG, McKEOWN and FISHER, Circuit Judges.

Oregon state prisoner Earl X ("petitioner") appeals the district court's denial, as untimely, of his motion to amend his 28 U.S.C. § 2254 habeas petition filed in 1999. Petitioner's initial petition, filed pro se, alleged various ineffective assistance of counsel claims. After counsel had been appointed and after the statute of limitations had passed, petitioner moved to amend his petition by adding a new claim alleging that the state had failed to disclose that petitioner had been serving as a government informant against the alleged victim of his crimes, thus violating *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied petitioner's motion, ruling that the *Brady* claim did not relate back to the date of the original petition within the meaning of Rule 15(c)(2) of the Federal Rules of Civil Procedure.

Under this court's recent decision in *Felix v. Mayle*, — F.3d —, 2004 WL 1770109 (9th Cir. Aug. 9, 2004), however, petitioner's *Brady* claim does relate back to the date of his original petition. In *Felix*, this court joined the Seventh Circuit in holding that under Rule 15(c)(2) "the proper 'conduct, transaction, or occurrence' in a habeas context is the trial and conviction under attack." *Id.* at *2; *see Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003). Petitioner's new *Brady* claim therefore relates back to his initial petition under Rule 15(c)(2) because it arose out of the same trial and conviction as the claims set fourth in his original pleading.

We accordingly reverse the district court on the Rule 15(c)(2) issue and do not reach (1) petitioner's arguments in the alternative, which rely on equitable tolling principles and the savings clause of 28 U.S.C. § 2244(d)(1)(D), and (2) respondent's contention that the Certificate of Appealability has not authorized petitioner to raise his equitable tolling and savings clause arguments. We remand to the district court for further proceedings with respect to petitioner's *Brady* claim, including, if necessary, the district court's consideration in the first instance of whether petitioner properly exhausted his *Brady* claim in the state courts and, if so, whether he can succeed on the merits of that claim. *See Bowen v. Roe*, 188 F.3d 1157, 1159 n.3 (9th Cir. 1999).

REVERSED and REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL X,	No. 02-36051
Petitioner-Appellant,	D.C. No. CV-99-00939-BR
v.	
MITCH MORROW,	ORDER AND MEMORANDUM
Respondent-Appellee.	

BEFORE: HUG, McKEOWN and FISHER, Circuit Judges.

Judges McKeown and Fisher voted to deny appellee's petition for panel rehearing and suggestion for rehearing en banc, and Judge Hug voted to deny the petition for panel rehearing and recommended denying the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and suggestion for rehearing en banc, filed September 13, 2004, is **DENIED**.

Opposition Brief Unavailable for Filming at this Time